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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARKLA ENERGY RESOURCES,
a division of Arkla, Inc.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission, acting under Section 5 of the Natural Gas Act, can fundamentally and permanently alter the service authorized by longstanding certificates of public convenience and necessity or can do so, if at all, only under the procedures and standards of Section 7 of that Act.

PARTIES TO THE PROCEEDING

In addition to Arkla Energy Resources* and the Federal Energy Regulatory Commission, the following persons were parties in the court of appeals:

Algonquin Gas Transmission Company
Aluminum Association, The
American Iron and Steel Institute
ANR Pipeline Company
Association of Business Advocating Tariff Equity

Brooklyn Union Gas Company, The

Cascade Natural Gas Company
Chattanooga Gas Company, a division of
Jupiter Industries, Inc.
City Gas Company
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
Consumers Power Company

El Paso Natural Gas Company
Equitable Gas Company

Foothills Pipe Lines (Yukon) Ltd.

Georgia Industrial Gas Group, The
Great Lakes Gas Transmission Company

Illinois Gas Company
Inter-City Gas Corporation

Madison Gas and Electric Company
Michigan Consolidated Gas Company

*Arkla Energy Resources is a division of Arkla, Inc., which is not affiliated with any companies other than its wholly-owned subsidiaries.

Michigan Gas Utilities Company
Michigan Public Service Commission, The
Midwestern Gas Transmission Company
MIGC, Inc.

Natural Gas Pipeline Supply Company of America
Northern Illinois Gas Company
Northwest Energy Company, on behalf of
Northwest Pipeline Corporation and
Northwest Central Pipeline Corporation
Northwest Natural Gas Company

Pacific Gas and Electric Company
Pacific Interstate Offshore Company
Pacific Lighting Gas Supply Company
Pacific Offshore Pipeline Company
Pan-Alberta Gas Ltd.
Panhandle Eastern Pipe Line Company
People of the State of California, The
Peoples Gas Light and Coke Company, The
Process Gas Consumers Group, The
Public Service Commission of the State of New York
Public Service Commission of Wisconsin, The
Public Service Electric and Gas Company
Public Utilities Commission of the
State of California, The

Southern California Gas Company
State Corporation Commission of Kansas
State of Michigan, The

Tennessee Gas Pipeline Company, a
division of Tenneco, Inc.
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
TransCanada Pipelines Ltd.
Transcontinental Gas Pipe Line Corporation

Transwestern Pipeline Company
Trunkline Gas Company

Washington Gas Light Company
Washington Natural Gas Company
Wisconsin Fuel and Light Company
Wisconsin Gas Company
Wisconsin Gas and Electric Company
Wisconsin Natural Gas Company
Wisconsin Power and Light Company
Wisconsin Public Service Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-

ARKLA ENERGY RESOURCES,
a division of Arkla, Inc.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Arkla Energy Resources ("Arkla"), a division of Arkla, Inc.,[1] seeks a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit to the extent that decision upheld orders of the Federal Energy Regulatory Commission ("Commission") precluding the enforcement of minimum take obligations in interstate natural gas pipeline company tariffs. The effect of those orders was to alter, fundamentally and permanently, the service provided by Arkla and others under long-standing certificates of public convenience and necessity issued under the Natural Gas Act ("NGA").

[1] Arkla's petition for review was filed in the court below under the name of Arkansas Louisiana Gas Company, a division of Arkla, Inc. Following the submission of briefs, the Commission authorized the company to change the name under which it operated its facilities subject to federal regulation to Arkla Energy Resources, a division of Arkla, Inc.

OPINIONS BELOW

The opinion of the court of appeals is reported at 770 F.2d 1144 and is reproduced in the Appendix.[2] Of the five Commission orders reviewed in that opinion, three are officially reported. III Fed. Energy Guidelines (CCH) ¶¶ 30,571, 30,584, 30,607 (Order Nos. 380, 380-A and 380-C, respectively). All five orders are reproduced in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. Requests for rehearing and suggestions for rehearing *en banc* were denied October 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2350 (1982).

STATUTES INVOLVED

The principal statutory provisions involved are NGA Sections 5 and 7, 15 U.S.C. §§ 717d, 717f (1982), relevant portions of which are reproduced in the Appendix.

STATEMENT OF THE CASE

A. Background

This petition is necessitated by a court of appeals decision that upheld Commission orders limiting the continued effectiveness of "minimum bill" provisions and precluding

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[2] The opinions of the court of appeals and the Commission are contained in the Appendix to the petition for certiorari filed by Transwestern Pipeline Company ("Transwestern") that seeks review of the same court of appeals decision. Transwestern Pipeline Co. v. FERC, No. 85-1219 (petition filed January 21, 1986). References to those opinions herein are to that Appendix, and are designated by "App. ." Arkla adopts Transwestern's Appendix as its own. In addition, Arkla has appended materials to this Petition as a supplement to that Appendix.

the enforcement of "minimum take" obligations in existing interstate natural gas pipeline tariffs. "Minimum bill" provisions are intended to assure the pipeline of a minimum revenue stream. They require that a pipeline customer pay the full tariff rate for a specified quantity of gas, either monthly or annually, whether or not the customer actually takes that minimum bill quantity. As a result, a purchaser can be billed under such a provision for gas it does not take and the pipeline is therefore not required to purchase. Failure to take the minimum bill quantity is not a breach of contract, it simply activates the minimum bill provision. Because changes in a pipeline's rates affect the potential dollar impact of the minimum bill provision, a minimum bill is closely related to a pipeline's rates.

A "minimum take" obligation, in contrast, represents a purchaser's absolute commitment to take delivery of a minimum volume of gas each day. Failure to take the specified volume constitutes a violation of the applicable certificate, tariff and contract, and the purchaser can be compelled to accept that volume. Minimum take obligations are typically included in pipeline sales contracts in order to accommodate the pipeline's need for operational stability[3] and to permit the efficient design of the pipeline's facilities.[4] Thus, a minimum take obligation is a fundamental feature of the service undertaken by the pipeline. Because the extent of a

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[3] These operational considerations are complex and vary from system to system. In many instances, pipelines receive supplies from thousands of wells spread over several states, rendering rapid regulation of system intake impossible. In addition, large portions of a pipeline's available gas supplies may be produced in conjunction with oil, causing gas availability to be subject to oil production. The need to protect certain gas reservoirs from geological damage may also necessitate a customer's agreement to purchase specified minimum volumes.

[4] For example, the pipeline is often able to avoid the construction of storage facilities that would otherwise be required to meet wide and sudden fluctuations in the purchaser's daily demand for gas.

customer's "minimum take" obligation is unaffected by rate change filings, it is not a rate provision.

Although Arkla is adversely affected by both the minimum bill and minimum take aspects of the Commission's orders, Arkla seeks Court review only of that portion of those orders which precludes enforcement of minimum take obligations.

B. The Commission's Orders

In August 1983, the Commission proposed through an exercise of its powers under NGA Section 5 to eliminate the variable cost portion[5] of minimum bill provisions in interstate pipeline tariffs. Following the receipt of comments, the Commission issued Order No. 380, which precluded pipelines from collecting through their minimum bill provisions more than the portion of the pipeline's rate attributable to fixed costs. On rehearing, the Commission claimed it had also intended its rule to preclude the enforcement of minimum take obligations. Because its original notice of proposed rulemaking had not raised this issue, the Commission requested comments on its new proposal. App. 131-33.

In Order Nos. 380-C and 380-D, the Commission applied its minimum bill rule to minimum take obligations. As a result, if a pipeline customer fails to take the minimum volume specified by contract, the pipeline can only require the customer to pay the fixed cost portion of the rate attributable to the deficient volumes. In essence, the Commission's orders have converted minimum take obligations into minimum bill provisions.

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[5] The overwhelming majority of variable costs reflected in pipeline rates are amounts paid by the pipeline to its gas suppliers. For example, in Arkla's case, those purchased gas costs represent almost 99.5% of Arkla's total variable costs.

C. The Impact on Arkla

Since 1968, Arkla has sold gas to Northwest Central Pipeline Corporation ("Northwest Central") and its predecessors under a contract containing both a minimum bill provision and a minimum take obligation. Under that agreement, Northwest Central could take as much as 132,270 Mcf per day and had a minimum take obligation of 74,593 Mcf per day. The minimum bill provision required that Northwest Central pay for an annual average of 99,457 Mcf per day, whether or not it took that volume. Performance of the contract required Arkla to construct a major extension of its facilities into Missouri for the sole purpose of making the sale. After extensive hearings, the Commission issued a certificate authorizing Arkla to perform the proposed service in accordance with the the terms of that contract. *Cities Service Gas Co.*, 38 F.P.C. 364 (1967).

At the time of Order No. 380, Arkla and Northwest Central had on file with the Commission a proposed settlement eliminating Arkla's right to recover purchased gas costs through the minimum bill provision. That settlement specifically confirmed that, under the contract and applicable certificate, Northwest Central had a daily minimum take obligation of 74,593 Mcf per day. Following the issuance of Order No. 380-A, the Commission approved the settlement. *Northwest Central Pipeline Corp.* v. *Arkansas Louisiana Gas Co.*, 28 FERC ¶ 61,211, at 61,390 (1984).

Because the Arkla-Northwest Central contract already contains a minimum bill provision, the effect of the Commission's Order Nos. 380-C and 380-D is to eliminate the minimum take provision from the contract. Arkla's maximum delivery obligation is unaffected, however. Thus, Arkla must deliver up to 132,270 Mcf on any day Northwest Central so demands, but Northwest Central has no obligation to purchase any gas. Northwest Central continues to demand full daily contract volumes whenever its system operations so

require. Since the issuance of Order No. 380-C, however, Northwest Central at other times takes at levels well below the minimum take volume.[6] The service provided by Arkla has therefore been fundamentally altered and Arkla has been precluded from rendering the type of service it agreed to provide when it accepted the certificate to sell to Northwest Central.

D. The Decision Below

The court of appeals[7] failed to distinguish between minimum take obligations and minimum bill provisions, treating the two as synonymous and referring to both as "minimum bills." *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1150 n.3 (D.C. Cir. 1985), App. 19. As a result, in responding to numerous challenges to the Commission's authority under NGA Section 5 to modify existing minimum bill provisions and minimum take obligations, the court of appeals spoke only in terms of the Commission's authority under Section 5 to modify "minimum bills."

Confining its discussion of that authority to a single footnote, the court of appeals asserted that the Commission could modify "minimum bills" under NGA Section 5 for two reasons: First, "elimination of minimum bills has no effect on the pipeline's *authorized* service . . . [and] merely addresses the *rates* the pipeline may charge its customers" and, second, NGA Section 5, by providing the Commission authority to alter the terms of existing contracts found to be "unjust and unreasonable," empowers the Commission to

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[6] For a period of time following Order No. 380-C, Northwest Central took no gas from Arkla. Now, Northwest Central generally purchases an average of 50,000 Mcf per day during the five-month winter season and 35,000 Mcf per day during the remainder of the year.

[7] Arkla petitioned for review of the Commission's orders pursuant to NGA Section 19(b), 15 U.S.C. § 717r(b) (1982).

modify "minimum bills." 770 F.2d at 1153 n.9 (emphasis in original), App. 25-26.[8]

REASONS FOR GRANTING THE WRIT

This Case Presents a Question of First Impression Critical to the Administration of the Natural Gas Act.

When attempting to give effect to its current view regarding the appropriate role of minimum take obligations, the Commission must adhere to the statutory limits placed on its authority. "Congress did not give the Commission *carte blanche* to take whatever action it might consider appropriate" in the regulation of the natural gas industry. *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, 263 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 976 (1972).

By eviscerating minimum take obligations, the Commission effected a fundamental change in Arkla's existing certificated service. Now Arkla is required to render a service it never agreed to provide.

Although the Commission has authority under NGA Section 5 to alter certain terms and conditions of service, the Commission is not given the power under that provision to alter permanently the service itself. Fundamental and permanent changes in certificated authority can be accomplished, if at all, only under NGA Section 7, which specifically addresses reductions and increases in service.

The precise scope of the Commission's authority to alter certificated service is a question of first impression and the

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[8] The only cases cited by the court of appeals in support of its conclusions involved the well-settled principle that NGA Section 5 empowers the Commission to modify rates in existing contracts and tariffs. Permian Basin Area Rate Cases, 390 U.S. 747, 783-84 (1968); Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378, 389 (1959). These decisions do not address the Commission's authority to modify existing certificates.

source of substantial confusion within the industry. In the past, the Commission questioned its authority to make *any* unilateral changes in certificated service. Beginning with the orders below, however, the Commission has asserted, with virtually no analysis, the authority to effect such fundamental changes in existing certificates under NGA Section 5. To the extent it may be said to have addressed the issue at all, the Commission appears to have relied on an erroneous interpretation of this Court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The court of appeals failed to address the issue because of its unexplained insistence on treating minimum bills and minimum take obligations as identical in substance.

If left unresolved, the uncertainty regarding the stability of existing certificates will inhibit, or substantially increase the cost of, investment in natural gas pipeline facilities. The Court should therefore exercise its *certiorari* jurisdiction to review this unprecedented invasion of existing certificates and to clarify the extent of the Commission's authority under NGA Sections 5 and 7.

A. The Commission's Minimum Take Orders Effect A Fundamental Change in Certificated Service.

The court of appeals failed to recognize that this case presents the issue of the Commission's authority to alter existing certificates. Elimination of Northwest Central's minimum take obligation, however, has clearly caused a fundamental change in the service Arkla offered, and was authorized, to provide.

Arkla agreed to make available an annual average of 99,457 Mcf per day. Northwest Central needed flexibility to take higher volumes during the winter when its heating load increased and lower volumes when its system demand dropped in the summer. In return for providing Northwest Central flexibility to swing up to 132,270 Mcf on any day,

Arkla required that Northwest Central take no less than 74,593 Mcf on any day, and designed its pipeline facilities accordingly. Absent this limitation, Arkla would have been required either to lower the maximum volume that could be taken under the contract or to design Arkla's pipeline system and gas purchase arrangements in a way that accommodated the wide swings otherwise possible under the agreement.

Precluded by the Commission's orders from enforcing Northwest Central's minimum take obligation, Arkla is now required to provide a substantially different kind of service. Viewed from one perspective, Arkla's service obligation has been reduced to a type of peaking[9] service available at Northwest Central's demand. From another perspective, Arkla's obligations have been enlarged, requiring it to accommodate swings in demand far greater than those to which it committed.[10] Under either view, the service originally agreed to when Arkla accepted its certificate has been fundamentally altered.

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[9] A peaking service is intended to accommodate wide fluctuations in a customer's demand generally related to sharply increased requirements during cold weather. Peaking service is generally more expensive because the capacity required to meet peak demands remains idle for considerable portions of the year. In contrast, baseload service, such as Arkla agreed to provide Northwest Central, affords the customer with a steady level of service throughout the year, which is deliverable at lower per unit costs because pipeline capacity is more fully utilized. Not only do these differences in service affect how a pipeline is designed and built, but they also compel different gas acquisition policies.

[10] The Commission's orders have also affected the reliability of Arkla's service and impaired Arkla's ability to manage its gas supply in a rational manner. For example, Northwest Central sharply increases its demands for gas at times of peak winter demand on Arkla's system. Because Arkla's purchases cannot be increased and moved to market fast enough to meet these peak demands, Arkla has been required to curtail deliveries to several customers, including Northwest Central. This problem did not arise when Northwest Central adhered to the more narrow range of variations in demand permitted when the minimum take obligation was in effect.

The delivery and take obligations under a gas sales contract are at the core of the contract between the parties and, thus, central to the service certificated by the Commission. The court below was wrong, therefore, in concluding that the elimination of one such core obligation had no effect on authorized service.[11]

B. NGA Section 5 Does Not Authorize Fundamental Changes in Existing Certificates.

The Commission's attempt to eliminate minimum take obligations through the exercise of its NGA Section 5 authority is unlawful. That Section's authorization to change terms and conditions of service if they are "unjust and unreasonable," does not extend to fundamental and permanent changes in existing certificates. Such alterations of the fundamental character of certificated service, particularly when that change transforms the transaction into a wholly new type of service, can be accomplished, if at all, only under NGA Section 7.

Section 7 is the only portion of the NGA that authorizes enlargements or reductions in certificated service. Before jurisdictional service can be enlarged, the Commission must issue a certificate authorizing the expanded service. NGA Section 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A) (1982). The Commission must find that the pipeline is "willing and able" to provide the service and may attach conditions to its authorization to assure that any new service will meet the "public convenience and necessity." NGA Section 7(e), 15

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[11] The court below also erred in suggesting that minimum take obligations only affect pipeline rates. Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1153 n.9 (D.C. Cir. 1985), App. 25-26. Minimum take obligations, as distinguished from minimum bill provisions, are not rate-related. Minimum take obligations require that a customer take a specific volume. No money is paid for gas not taken and there is no argument that the purchaser may be required to pay more than a just and reasonable rate for the gas it purchases.

U.S.C. § 717f(e) (1982). Nevertheless, the Commission may not compel a company to render service on terms the company finds unacceptable. Even though it may have been "willing and able" to perform the service it proposed, the company may reject the certificate as conditioned by the Commission and decline to provide the service. *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 387-88 (1959).

Once a certificate has been accepted and service has commenced, the company may not alter or abandon that service without the prior approval of the Commission. NGA Section 7(b), 15 U.S.C. § 717f(b)(1982). Permanent reductions in delivery and take obligations represent significant alterations of certificated service and can only be accomplished under NGA Section 7(b). *Reynolds Metals Co.* v. *FPC*, 534 F.2d 379, 384 (D.C. Cir. 1976).

The purpose of NGA Section 7 would be undermined if, once certificated, service could be transfigured under NGA Section 5 without reference to the standards of NGA Section 7. The Commission would be relieved of its obligation to find that the service is consistent with the "public convenience and necessity" and to find the company "willing and able" to perform the service as modified.[12]

The court below failed to address these issues. Whatever the validity of its conclusion that minimum bill provisions can be altered under NGA Section 5, that conclusion cannot be extended to minimum take obligations.

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[12] The rulemaking procedures utilized by the Commission in the orders under review are not appropriate for NGA Section 7 actions. The Administrative Procedure Act ("APA") provides that proceedings affecting licenses are adjudications and generally subject to the same statutory safeguards provided for in other formal adjudicatory proceedings. 5 U.S.C. §§ 551(7), 551(8), 558(c) (1982). Certificates issued under the NGA are licenses within the meaning of the APA. 5 U.S.C. § 551(9) (1982). These provisions of the APA are reproduced in the Appendix to this Petition.

Although the Commission did not directly address the impact of its minimum take orders on existing certificates, it appears to have relied on this Court's opinion in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) ("*LP&L*"), as authority for its action. App. 135, 248-49. The *LP&L* case, however, involved the Commission's utilization of NGA Section 4, 15 U.S.C. § 717c (1982), not NGA Section 5, 15 U.S.C. § 717(d) (1982). 406 U.S. at 644. Furthermore, in *LP&L* the Court was addressing changes in curtailment provisions to be applied during a "temporary" nationwide natural gas shortage. *Id.* at 626. *LP&L* did not involve permanent alterations of certificated service, which can be accomplished, if at all, only under NGA Section 7. *Reynolds Metals Co.* v. *FPC*, 534 F.2d 379, 384 (D.C. Cir. 1976); *Michigan Power Co.* v. *FPC*, 494 F.2d 1140, 1144 (D.C. Cir. 1974)(distinguishing *LP&L*).

In Order No. 380-A, the Commission also asserted with respect to its minimum bill orders that it had the "authority to alter the terms and conditions of certificated service even though the affected parties, acting alone, could not have changed them." App. 135. The Commission does have the authority under NGA Section 5 to alter terms and conditions that the pipeline could not alter under NGA Section 4 because of contractual limitations. *Compare FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) *with United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). There is no precedent, however, in support of the proposition that the Commission, acting under NGA Section 5, may alter terms and conditions that a pipeline could only alter under NGA Section 7. Permanent and significant changes in certificated service can be accomplished, if at all, only under the procedures and standards of NGA Section 7.

C. Resolution of the Commission's Authority to Modify Existing Certificates is Necessary to End Industry Confusion that Jeopardizes Future Financing of Pipeline Facilities.

The scope of the Commission's authority under the NGA to alter certificated service permanently has never been before this Court. As discussed above, however, the NGA does not explicitly provide such authority. In the context of other statutes that did not explicitly confer authority to upset existing certificates, this Court has refused to imply any such authority. *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 429-32 (1947); *CAB* v. *Delta Air Lines, Inc.* 367 U.S. 316, 322-25 (1961).

Until recently, the Commission had never asserted any authority to modify existing certificate obligations permanently. Indeed, not long before the issuance of Order No. 380, one of the Commission's law judges concluded that the Commission lacked the authority unilaterally to revoke, suspend or adversely modify existing certificates. *Trunkline LNG Co.*, 22 FERC ¶ 63,028, at 65,135-39, *aff'd*, 22 FERC ¶ 61,245 (1983). Although finding that determination "scholarly and well-reasoned," the Commission found it did not need to reach this "difficult question." 22 FERC ¶ 61,245, at 61,442. With virtually no discussion, however, the Commission in Order No. 380-C directed the eradication of minimum take obligations. App. at 248-49. More recently, the Commission has asserted the power under NGA Section 5 unilaterally to order changes in the contract demand volumes in existing certificates. *Regulation of Natural Gas Pipelines after Partial Wellhead Deregulation*, 50 Fed. Reg. 52217, 52224 (1985). As previously discussed, this recent attempt to expand the Commission's authority appears to be based on an erroneous interpretation of this Court's *LP&L* decision.

The importance to the industry of resolving the scope of the Commission's authority is manifest. The law judge in *Trunkline*, following an extensive hearing, succinctly explained the problem as follows:

> [M]assive investments must be and are made to construct facilities in reliance on the conditions and permanence for the prescribed term of the certificates issued by the Commission. Without . . . security, businessmen and investment institutions would not enter into such projects nor lend the necessary funds to make the projects possible. The record in this case leaves absolutely no doubt that investment funds will *not* be available if certificates, in the absence of violations, can be revoked by the granting agency at will for political or other reasons such as supply changes, pricing, etc.

22 FERC ¶ 63,028, at 65,138 (emphasis in original). On Commission review, two commissioners argued for a clear finding that the Commission does not possess the authority to "unilaterally modify or revoke a Section 7 certificate." 22 FERC at 61,445. The purpose of this plea was to avoid the chilling effect of regulatory uncertainty on investment in natural gas facilities. *Id.* Absent the Court's resolution of this uncertainty, that chilling effect will remain a formidable deterrent to pipeline financing, to the ultimate detriment of natural gas consumers throughout the nation.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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January 23, 1986

APPENDIX

ADMINISTRATIVE PROCEDURE ACT

§ 2, 5 U.S.C. § 551 (1982)

* * * * * *

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

§ 9, 5 U.S.C. § 558 (1982)

* * * * * *

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given:

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.